SERVED: March 30, 1994

NTSB Order No. EA-4126

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. BARRY W. DUNN, Respondent.	Docket SE-12535

OPINION AND ORDER

Respondent has appealed from a June 25, 1992, order of Administrative Law Judge William E. Fowler, Jr.[1] that granted the Administrator's motion to dismiss as untimely respondent's appeal from a March 30, 1978, revocation order of which the respondent asserts he had no notice until February 7, 1992.[2] For the

[1]The law judge's order is attached. Respondent filed a brief on appeal, to which the Administrator replied.

[2]According to the Administrator's 1978 order, respondent's

reasons that follow, we deny the appeal.

This controversy surfaced when respondent, in July 1990, requested the FAA Certification Branch to reissue his pilot certificate with his new address. Although the Certification Branch learned from the Regional Counsel's Office that respondent had never surrendered his certificate pursuant to the 1978 revocation order, a duplicate certificate was mistakenly issued to respondent in September 1990. When the error was discovered, in February 1992, the Certification Branch notified respondent that the duplicate certificate should not have been issued to him and that he must return it immediately. Respondent, instead, filed on April 28, 1992, an appeal from the 1978 revocation order with the Board, wherein he took the position that the order should be dismissed as stale. The law judge disagreed and, as noted, granted the Administrator's motion to dismiss.

We agree with the law judge that respondent's stale complaint argument is unavailing. The order of revocation specifically states that respondent lacked the care, judgment, and responsibility necessary for the holder of a commercial pilot certificate. Also, part of the basis for the revocation was the use of an aircraft to transport 185 grams of marijuana. A drug-related conviction involving an aircraft always calls into question an airman's qualifications. See Administrator v. Hagan,

(..continued)
commercial pilot certificate was revoked under section 61.15(c) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 61, for violating a statute regarding the possession of marijuana, and for violations of FAR sections 61.3(c), 91.12(a), 91.27(a)(2), 91.29(a), and 91.169(a)(1). 14 C.F.R. Parts 61 and 91.

NTSB Order No. EA-3985 (1993).

As to the timeliness of respondent's appeal, we think the resolution of that question rests upon the adequacy of service of the original order on the respondent, for if the order was properly served, then clearly respondent did not file his appeal within the 20 days provided by our rules for doing so. See section 821.30(a) of the Board's Rules of Procedure, 49 C.F.R. § 821.30(a). Answering that question so long after the fact is no easy matter, however, because, among other things, return receipts for the notice of proposed certificate action and for the revocation order, which would have been sent by certified mail, are no longer available. The FAA, pursuant to published practice, does not retain for more than 10 years records in cases that have been closed.[3] Still available, however, are the actual notice of proposed certificate action and the revocation order.

Two addresses appear on the order of revocation;[4] a third on the notice of proposed certificate action.[5] The record reflects

[3]We cannot fault the Administrator for destroying an inactive file 10 years after the case was closed, in accordance with its records disposition program, established under the requirements set forth by the National Archives and Records Administration. See 36 C.F.R. Part 1228.

[4]The two addresses are 3435 Hidalgo, Apt. 215, Dallas, Texas, 75220 and 202 East Corral Way, Grand Prairie, Texas, 75052.

[5]The address listed on the notice of proposed certificate action is a P.O. Box in Ramona, California. The alleged infraction apparently occurred at Ramona Airport. Respondent does not deny that this was ever his mailing address. Rather, he contends that he never received the notice and that the Administrator did not prove that mailing address was ever his.

that under the FAA's standard procedures, then and now, the order and notice would have been sent to those addresses, first by certified mail, return receipt requested, and then, if returned unclaimed, via regular mail.[6] Further evidence, in the form of affidavits of employees in the Office of Assistant Chief Counsel, Western-Pacific Region, provides a reasonable ground for concluding that the notice and order were not returned by the post office. Administrator's brief, attachments 9 and 10. One employee, in describing office procedure, stated, "If [the final order] was returned and we were unable to locate the airman through our Air Security Office, the case would be closed and an entry would be made on the violation report data card indicating that we were unable to locate the airman."[7] Id., attachment 10. Respondent's violation report data card contains no such entry.

[6]The notice and revocation order state, "CERTIFIED MAIL, RETURN RECEIPT REQUESTED." The Administrator submitted evidence to the law judge that it was the standard practice in the FAA's Western-Pacific Regional Office to send both the notice of proposed certificate action and the order of revocation via certified mail, return receipt requested, and, if returned unclaimed, via regular mail. See Administrator's brief, attachments 9 and 10.

[7]This affiant was an Administrative Legal Assistant in the Assistant Chief Counsel's Office from 1971 to 1976, admittedly earlier than the date of the revocation order. Yet, there is no reason to believe that the office procedures to which she testified were any different in 1978. In addition, the declaration of the Deputy Assistant Chief Counsel of the same office stated that he has been employed in this position since 1977 and that the standard office procedures for service of documents were the same in 1977 and 1978 as they were in 1992. See supra, n. 5; Administrator's brief, attachment 9. He further declared that there were no entries on respondent's violation report data card to indicate that the case was processed in a way other than by standard procedure.

Id., attachment 2.

Although respondent does not admit that one of the addresses was his address of record, he admits that on November 10, 1974, he requested a duplicate copy of his airman certificate and supplied the Administrator with the address of 3434 Hidalgo, Apt. 215, Dallas, Texas, 75220. The revocation order lists 3435 Hidalgo, Apt. 215, Dallas, Texas, 75220, as one of the two addresses to which the order was sent. While it is possible, it seems unlikely that a letter misaddressed by only a building number that was listed as 3435 rather than 3434 ultimately would not have been delivered to the intended address. Be that as it may, respondent does not contend that the other addresses were incorrect or that he would not have received mail sent to them.[8]

Respondent's assertions that the case must be dismissed because the Administrator cannot now prove that the addresses listed on the notice and order were correct or that he in fact received the mailings are unavailing. We have previously recognized that constructive service of the Administrator's orders satisfies notice requirements. See Administrator v. Hamilton, 6 NTSB 394, 396 (1988). Thus, whether respondent in fact received the notice and order is not dispositive, for it is enough that the Administrator has advanced evidence supportive of a finding that those documents were mailed to respondent's

[8]Under FAR section 61.60, the holder of a pilot certificate who wishes to preserve his right to exercise its privileges must advise the Administrator of any change in his permanent address within 30 days.

address(es) of record by certified mail and were not returned to the Administrator.

While it is true that due to the passage of time the Administrator is unable to now prove that any of the addresses listed on the notice and order were formerly respondent's addresses of record,[9] the respondent does not argue, and he offers no evidence to show, that they were not. In fact, respondent makes no attempt to deny that mail sent to those addresses would not have been received by him or should not have been expected to reach him. Rather, he simply argues that he did not receive the two documents relating to the revocation and that the addresses used by the Administrator to send them to him do not appear anywhere else in the Administrator's files. We do not think this helps respondent, for the addresses on the notice and revocation order may properly be deemed to constitute some evidence, and, indeed the only evidence in the record before us, as to respondent's actual address at the time.[10] Absent some evidentiary submission by him that the addresses used by the

[9]It appears that the Airman Certification Branch of the FAA, with whom an airman must register a change of address, does not retain the former addresses. Therefore, even if respondent's case file was still in existence, the Administrator might be in no better position in attempting to show that any of the three addresses used had been respondent's address of record fourteen years earlier.

[10]No reason appears why the Administrator should not be accorded a presumption of regularity in the mailing of the two documents to respondent, that is, that they were processed in accordance with routine office procedures and sent to addresses officially maintained based on information supplied by respondent.

Administrator were all invalid, we see no reason not to accord them weight.

In sum, we think the law judge could reasonably find that adequate constructive service of the revocation order was effected on the respondent.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's dismissal of respondent's appeal is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.